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State of Utah

DEPARTMENT OF NATURAL RESOURCES

BRIAN C. STEED
Executive Director

Division of Oil, Gas and Mining

JOHN R. BAZA
Division Director

December 3, 2019

Kenneth S. Fleck, Manager of Geology and Environmental Affairs
Interwest Mining Company
P.O. Box 310
Huntington, Utah 84528

Subject: Findings of Fact and Conclusions of Law for Notices of Violation 21219 and 21220, Deer Creek Mine, C/015/0018

Dear Mr. Fleck:

On November 15, 2019 an Informal Assessment Conference was held at the Division of Oil, Gas and Mining regarding a violation issued to PacifiCorp at the Deer Creek Mine on September 16, 2019. As a result of the facts given at the conference, I have reduced the assessed fine as explained on the attached sheets.

Within fifteen (30) days of your receipt of this finding, you or your agent may make a written appeal to the Board of Oil, Gas and Mining. To do so, you must escrow the assessed civil penalties with the Division within thirty (30) days of receipt of this letter, but in all cases prior to the Board Hearing. Failure to comply with this requirement will result in a waiver of your right of further recourse.

If no timely appeal is made, this assessed civil penalty of \$990.00 must be tendered within thirty (30) days of your receipt of this letter. Please remit payment to the Division of Oil, Gas and Mining, c/o Vickie Southwick at 1594 West North Temple, Suite 1210, Salt Lake City, UT 84116

Sincerely,

Dana Dean, P.E.
Deputy Director
Assessment Conference Officer

CC ogmcoal@utah.gov
Steve Christensen
John Webster
Karl Houskeeper

**BEFORE THE DIVISION OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH**

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**IN THE MATTER OF THE
INFORMAL HEARING FOR
PROPOSED ASSESSMENT FOR
VIOLATIONS No. N 21219 and N
21220, DEER CREEK MINE,
C/015/0018 EMERY COUNTY,
UTAH**

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**FINDINGS of FACT,
CONCLUSIONS OF LAW
AND ORDER**

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BACKGROUND

On November 15, 2019, the Division of Oil, Gas and Mining (Division) held an Informal Assessment Conference as provided by Utah Admin. Code R645-401-700 (2019) in response to the written request by PacifiCorp dated October 22, 2019. The hearing was scheduled to review the penalties assessed for Notices of Violations (NOV) # 21219 (conducting blasting without a certified blaster), and NOV # 21220 (failure to comply with the R645 Rules for Underground Coal Mining and Reclamation Operations and the approved MRP). The Violations were noted to have occurred August 27, 2019 and the NOV's were issued on September 16, 2019. The proposed assessments were mailed to PacifiCorp on October 11, 2019. Written notice of the hearing was emailed to PacifiCorp on October 29, 2019. By agreement of parties the conference was held more than thirty (30) days after service of the NOV.

The Division was represented by Steve Christensen, Division Coal Program Manager, Karl Housekeeper, Division Inspector from the Price, Utah Field Office, and John, Webster, Division Environmental Scientist and Assessment Officer. PacifiCorp was represented by Chuck Semborski, Manager of Geology and Exploration; Kenneth Fleck, Geology and Environmental Affairs Manager; Dennis Oakley, Senior Engineer; and Scott Child, Manager of Lands and Regulatory Affairs. Dana Dean, Deputy Director for Mining, for the Division served as the hearing officer. Steve Alder, Assistant Utah Attorney General advised and assisted the hearing officer.

PacifiCorp stated they did not intend to contest the fact of violation for either NOV but did intend to discuss the facts and circumstances associated with the NOV's in order to explain why they thought the penalties were too high. PacifiCorp also argued that under the facts, one NOV was appropriate, not two. PacifiCorp alleged that the blasting regulations (Utah Admin. Code R645-301-524 to 645-301-524.8009(2019)), did not apply to the reclamation work because they were not engaged in any of the specific activities subject to the regulations.

[PacifiCorp's first argued that the regulations at R645-301-524 do not apply since it is no longer mining coal, and that the specific activities included in the definition of underground mining by the regulations do not include the actions they were conducting at the time of the violation. PacifiCorp also said if the Division thinks they do apply that the regulations are not clear and should be amended to make it clear that they apply to the type of activities being conducted by it at the time.]

The Hearing Officer, having reviewed the statements and documents submitted by the Division in support of the proposed assessed penalties, and having considered the objections, evidence, and arguments by Petitioner, and having reviewed the law applicable to the facts, makes the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. PacifiCorp is the operator of the Deer Creek Mine C/015/0018 which is an underground coal mine subject to provisions of the Utah Coal Mining and Reclamation Act (Coal Act, Utah Code §§ 40-10-1 to 30(2019)), and the jurisdiction of the Utah Division of Oil, Gas and Mining (Division) which is the agency authorized to implement the Coal Act and its regulations.
2. PacifiCorp has ceased the underground activities related to its mining of coal and is in the last stages of removing surface facilities used during mining and reclaiming the surface disturbances that were associated with the underground mining operations.
3. At the time of the violations, PacifiCorp was engaged in reclamation of disturbed lands near a closed portal to the approximate original control as required by the regulations and in accordance with the approved mine land reclamation plan (MRP).
4. PacifiCorp determined that certain rock outcrops near the portal area were inconsistent the desired reclaimed surface contour and were a potentially unsafe condition due to loose rock in the area above the outcrop, and decided that reducing the rock outcrops was necessary.
5. PacifiCorp determined that the rock outcrop would need to be blasted, and there was a small window of time to complete that blasting in order to have necessary access and accommodate the other grading and other contouring work being done at that time.
6. PacifiCorp contracted the blasting with Three Rivers Company, an approved and licensed contractor they had used before and who they knew to be qualified and to have a certified blaster.
7. Three Rivers did a pre-blast inspection with Pacificorp prior to the site at which time it was determined that access was limited and distances restriction and notices of the blasting had been observed.

8. Although PacifiCorp stated they believed they had gone through a check list of the items required by the regulations, they did not provide a blast design, any record of the pre-blast survey and notices, or notice of the anticipated blasting to the Division until the time of the conference.

9. PacifiCorp and Three Rivers arranged to drill and load the holes to be blasted on the weekend prior to the blast in order to meet the schedule of other work. Three Rivers had a certified blaster at the location when this work was done.

10. On August 27, 2019 the outcrop was blasted using 36 pounds of explosive per eight milliseconds of delay. The blaster was trained and experienced but was not certified in Utah.

11. The Division inspector was not aware that the blasting was planned until he observed the site being prepared for blasting on the day of the blast, and on August 29, 2019 he requested information about the blast, and determined that the blaster did not have a Utah state certificate, and that the amount of explosive used for the blasting exceeded the limits in the mine permit (MRP) of 5 pounds of explosive per 8 milliseconds delay.

12. As a result of his investigations into the blast the Division Inspector issued two violations on September 16, 2019: NOV # 21219 for failure to have a certified blaster on site; and NOV # 21220 for failure to comply with the R645 Rules governing blasting and the portions of the approved MRP concerning blasting.

13. On October 11, 2019 the Division issued its Proposed Assessments for each violation, as calculated by John Webster, Division Assessment Officer.

14. The Proposed Assessment for NOV # 21219, Blasting without a Certified Blaster determined points and the corresponding penalty as follows: History points - 0; Seriousness points - 20; Negligence points - 20; and Good Faith points - 0; Total points - 40; corresponding to a penalty under R645-401-330 of \$2,200.00.

15. The Division's Seriousness points of 20 were based on a determination that the violations occurred; i.e., the blasting was done without a certified blaster, resulting in the maximum of 20 points.

16. The Division determined the Negligence points of 20 based on the Inspectors' statement that the violation indicated an indifference to DOGM regulation and its MRP which both require a certified blaster.

17. The Proposed Assessment for NOV # 21220, Blasting in violation of the regulations, and the MRP was determined as follows: History points - 0; Seriousness points - 20; Negligence points - 26; and Good Faith points 0; Total points - 46; corresponding to penalty under R645-401-330 of \$2,860.00.

18. The Seriousness points for NOV # 21220 were based on the same justification as NOV # 21219; i.e., the blast was conducted without a certified blaster; the Negligence points

were higher based on the additional finding by the inspector that the blast exceeded the 5 pounds per 8/ms delay approved in the permit, that there had not been a pre blast survey, notice to local officials, and that "a blast plan had not been submitted to the Division for review and approval."

19. PacifiCorp further argued that if the regulations do apply, that the Seriousness points for NOV # 21219 and NOV #21220 should have been based on the seriousness of the potential harm that the regulation were designed to prevent and that there was a low risk of harm since a certified blaster had been involved in planning and other work prior to the blast.

20. PacifiCorp argued that the Negligence points should also have been reduced because they had taken reasonable care to observe all of the concerns covered in the regulations and were not aware of the lack of certification until afterward.

21. Finally, PacifiCorp argued that there should not have been two violations issued for what was essentially one violation and that two violations compounding the penalty for one mistake.

22. Each NOV is independent of the other, involve separate omissions, and present separate elements of negligence and seriousness, and the citation of two NOV's did not create excessive liability for the same omission.

23. Although PacifiCorp did take care and concern was given to comply with general requirements pertaining to design of the blast and precautions for safety, PacifiCorp did not share a blasting plan with the Division, did not include the Division in the pre-blast inspection, and did fail to comply with the regulations pertaining to having a certified blaster and the MRP's limitations on the size of the blast.

CONCLUSIONS OF LAW

1. The Coal Act regulates activities that constitute coal mining operations to "the full reach of state constitutional powers to insure the protection of the public interests through effective control of surface coal mining operations . . ." Utah Code § 40-10-2

2. The Coal Act defines surface coal mining operations to mean "activities conducted on the surface of lands in connection with a surface coal mine or . . . surface operations and surface impacts incident to an underground coal mine" Utah Code § 40-10- 3(20)

3. No person shall engage in or carry out surface coal mining operations within the state unless that person has first obtained a permit issued by the division pursuant to an approved mining and reclamation program" Utah Code § 40-10-9

5. Each permit must meet minimum performance standards which include: "(o) [e]nsure that explosives are used only in accordance with existing state and federal law and the rules adopted by the board, which shall include provisions to: (i) provide adequate advance notice to local governments and residents who might be affected by the use of the explosives . . . (iii)

limit the type of explosives and detonating equipment . . . so as to prevent injury to persons, damage to public and private property, . . . outside the permit area; . . . [and] (iv) require that all blasting be conducted by trained and competent persons, and to implement this requirement, the division shall promulgate rules requiring the training, examination, and certification of persons engaging in or directly responsible for blasting" Utah Code § 40-40-17(2)(o)(i) through (iv) as applied by Utah code 40-10-18 (12(a)(iii)).

6. The Coal Act further requires that "[e]ach permit relating to underground coal mining issued pursuant to this chapter shall require the operator to. . . maintain the value and reasonably foreseeable use of the surface lands; . . . and establish on regraded areas and all other lands affected, a diverse and permanent vegetative cover" Utah Code 40-10-18 (2)(iii) and (8)

7. The rules adopted under the Coal Act, set forth the requirements that must be met for a permit application to be approved, and include provisions regarding the use of explosive which provides:

"[F]or the purposes of UNDERGROUND COAL MINING AND RECALAMATON ACTIVITIES, R645-301 -524-100 through R645-301524.700 apply to surface blasting activities incident to underground coal mining, including but not limited to, initial rounds of slopes and shafts. R645-301-524

And

" After July 28, 1987, all surface blasting operations incident to underground mining in Utah will be conducted under the direction of a certified blaster." R645-301-524.11

8. Provisions at R645-301-524.100 through 524.700 include requirement for a certified blaster on site for all blasting, blast design, a pre-blasting survey, notification of all residents, and record keeping all of which are applicable to underground mining per R645-301-524.

9. UNDERGROUND COAL MINING AND RECALAMATON ACTIVITIES are defined as "coal mining and reclamation operations incident to the extraction of coal by underground methods"

10. Reclaiming surface areas used to access the underground workings are operations on surface areas incidental to underground mining and constitute Underground Mining and Reclamation Activities as defined by the Act and operations such as reclamation and blasting associated with the reclamation of those areas are subject to the Act and its regulations.

11. The regulations at R645-310-524.100 to 524.7000, therefore apply to any blasting required as part of the reclamation of lands disturbed by a portal used to access underground mining; and in particular R645-301-154-110 and 130 requiring a certified blaster; and R645-300-143 requiring compliance with the MRP and limits on blast size without approval.

12. The Deer Creek mine is permitted and all of the operations are subject to the provision of the permit including obligations to complete reclamation, which require that all operations be conducted in accordance with the requirements of the Coal Act, including the extensive regulations for blasting.

ORDER

1. The Division's citation of two NOV's was appropriate for the separate actions as observed and the issuance of separate penalties is not duplicative or excessive.

2. The penalties for NOV # 21219 and NOV # 21220 are upheld except as follows:

a. The Division's determination of points for Seriousness and negligence for NOV # 21219 are modified to 20 total based on a reduction of negligence points from 20 to 10 and reduction of seriousness points from 20 to 10. The seriousness was reduced because no actual harm occurred, but it was likely that something could have occurred without the certified blaster on-site. The negligence was reduced because PacifiCorp contracted a well-known blasting firm who should have made sure that a certified blaster was on-site so it was not complete indifference. The penalty is now \$440.00 for NOV #21219.

b. The Division's determination of points for Seriousness and negligence for NOV # 21220 are modified to 25 total based on reduction of negligence points from 26 to 15 and reduction of seriousness points from 20 to 10. The seriousness was reduced because no actual harm occurred, but it was likely that something could have occurred by not following the blasting plan and having more charge per hole than in the permit. The negligence was reduced because PacifiCorp was not willfully avoiding the blasting regulations, but they did fail to notify the Division and provide a blasting plan before the scheduled blast. The penalty is now \$550.00 for NOV #21220.

RIGHT TO APPEAL

PacifiCorp, as the Operator, and any party adversely affected by this Order are advised that they have the right pursuant to Utah Code §40-10-22(3) and R645-400-360 Utah Administrative Code to file an appeal of this the issuance of the cessation order by filing a request for agency action in accordance with the Rules of the Board within 30 days of the notice of this decision upholding the issuance of the penalties for the Notices of Violations # 21219 and # 21220.

SO DETERMINED AND ORDERED this 3rd day of December, 2019



Dana Dean, Associate Director
Utah Division of Oil, Gas and Mining